Paul Law Ung Hua & Anor v Hong Wei Organisation Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO KG 113/94/II
ABDUL KADIR SULAIMAN J
19 MARCH 1996

Civil Procedure *— Pleadings — Defence — Application for extension of time to file defence — Whether extension of time can be allowed without any good reason given — Rules of the High Court 1980 O 18 r 2(1)*

Civil Procedure *— Pleadings — Striking out writ and statement of claim — No reasonable cause of action disclosed — Whether any evidence admissible when considering such application to strike out pleadings — Whether court can admit evidence by exercising its inherent jurisdiction — Whether there was a triable issue fit to be disposed of in a full trial — Rules of the High Court 1980 O 18 r 19(1)(a)*

Landlord and Tenant *— Lease — Non-registration — Whether failure to register a sublease exceeding one year will defeat a claim for damages for breach of agreement and misrepresentation — National Land Code 1965 ss 119 proviso, 158 & 161*

This was an application by the defendant under O 18 r 19(1)(a)–(d) of the Rules of the High Court 1980 ('the RHC') for the striking out of the plaintiffs' writ and statement of claim and a second prayer for an order that the filing of the defence be deferred to 14 days after the disposal of the application. The defendant, however, did not give any grounds to support its application for extension of time to file its statement of defence. The claim by the plaintiffs as contained in the statement of claim was for damages arising out of an alleged breach of a five-year tenancy agreement or damages for misrepresentation by the defendant in connection with the said agreement. The defendant contended that the plaintiffs' writ and statement of claim disclosed no reasonable cause of action and that on the basis of the court's inherent jurisdiction, evidence was allowable to establish that the pleadings of the plaintiffs disclosed no reasonable cause of action and should be struck out under O 18 r 19(1)(a) of the RHC. The defendant stated that the tenancy agreement was never registered as required by s 158 read with s 161 of the National Land Code 1965 ('the NLC') which meant that for the plaintiffs to succeed it must be within the exception provided in the proviso to s 119 of the NLC. Therefore, the failure by the plaintiffs to plead the exception would leave open the question of enforceability of the agreement under the law. The plaintiffs on the other hand submitted that they were not relying on the provisions of the NLC but instead were claiming under the tenancy agreement for damages for breach thereof. The defendant also contended that the pleadings were either scandalous, frivolous or vexatious, or that it might prejudice, embarrass or delay the fair trial of the action, or that it was otherwise an abuse of the process of the court grounded under O 18 r 19(1)(b) to (d) of the RHC.

Held, dismissing the application:

(1) By O 18 r 2(1) of the RHC, the defendant, if it intends to defend the action, was required to serve the defence on the plaintiffs, in this case, by 3 December 1994 as the writ was served on 24 November 1994 unless leave to the contrary was given. For such leave to be given, a good reason must be provided for the consideration of the court. Here, in the absence of any reason given, the second prayer must be dismissed (see p 494D–E).

(2) It is clear law that in an application to strike out pleadings under O 18 r 19(1)(a) of the RHC, no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied was whether on the face of the pleadings, the court was prepared to say that the cause of action or the defence was obviously unsustainable. Therefore, it is immaterial whether an applicant expressly includes a prayer for the court's inherent jurisdiction in any application under O 18 r 19 as in dealing with ground (a) of O 18 r 19 the inherent jurisdiction of the court does not extend to admitting evidence in support apart from the pleadings itself (see pp 494I, 495A, 496G–H; *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 not followed; *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226, *A-G of the Duchy of Lancaster v London and Northwest Rlwy Co* [1892] 3 Ch 274, *Wenlock v Moloney* [1965] 2 All ER 871 and *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 followed).

(3) Section 158 read with s 161 of the NLC requires that any sublease for any term exceeding one year must be registered. The effect of the non-registration of such a sublease is governed by the proviso to s 119 of the NLC which states that the non-registraion shall not operate to defeat a claim for damages or for specific performance founded upon such an instrument. In the present case, the plaintiffs were claiming for damages for breach of the agreement and for misrepresentation and were thus not affected whatsoever on account of the tenancy agreement being unregistered. This meant that the plaintiffs need not expressly plead the exception as suggested by counsel for the defendant. Therefore, the statement of claim of the plaintiffs clearly disclosed a reasonable cause of action and there was no basis under O 18 r 19(1)(a) of the RHC for the writ and the pleadings to be struck off because at this stage it sufficed that there was a reasonable chance for the plaintiffs to succeed in the sense that the action was not unsustainable (see pp 497G–I, 498A–B; *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177 and *Anthony Tan & Anor v Yong Foh Phin & Anor* [1960–63] SCR 77 distinguished).

(4) On the evidence tendered by the plaintiffs, the act of the defendant had caused much suspicion in the mind of the plaintiffs as to the

true intention of the defendant in terminating the tenancy agrement. Therefore, there was a triable issue fit to be disposed off at the full trial of the action and not by summary procedure of striking out the pleadings of the plaintiffs. It would be extremely dangerous to decide the matter on pure affidavit evidence and it being a triable issue which required proper consideration of evidence of witnesses given in a trial, it would be best left for the decision of the judge at the full trial of the action. There was no basis at all for saying that the action of the plaintiffs was either scandalous, frivolous or vexatious, or that it might prejudice, embarrass or delay the fair trial of the action, or that it was otherwise an abuse of the process of the court (see p 505C–D, G–H; *Anthony Tan & Anor v Yong Foh Phin & Anor* [1960–63] SCR 77, *Lee Ah Low v Cheong Lep Keen & Anor* [1970] 1 MLJ 7, *Lee Lam Soh v Low Ngah* [1973] 1 MLJ 97 and *Low Kum Yoon v Teh Kim Huah* [1979] 1 MLJ 83 distinguished).

[Bahasa Malaysia summary

Ini adalah permohonan oleh defendan di bawah A 18 k 19(1)(a)–(d) Kaedah-Kaedah Mahkamah Tinggi ('KMT itu') untuk membatalkan writ dan pernyataan tuntutan plaintif, dan permohonan kedua adalah untuk perintah bahawa memfailkan pembelaan boleh ditangguhkan selama 14 hari selepas penyelesaian permohonan itu. Defendan, walau bagaimanapun, tidak memberikan sebab-sebab untuk menyokong permohonannya untuk pemanjangan masa memfailkan pernyataan pembelaan itu. Tuntutan plaintif seperti yang terdapat dalam pernyataan tuntutan untuk ganti rugi timbul daripada kemungkiran perjanjian penyewaan untuk jangka masa lima tahun yang dikatakan atau ganti rugi untuk salah nyata oleh defendan berkenaan dengan perjanjian itu. Walau bagaimanapun, defendan mempertikaikan bahawa writ dan pernyataan tuntutan plaintif tidak memberikan kausa tindakan yang munasabah dan dengan alasan bahawa bidang kuasa mahkamah sedia ada, keterangan harus dibenarkan untuk menunjukkan bahawa pliding plaintif tidak memberikan kausa tindakan yang munasabah seperti di bawah A 18 k 19(1)(a) KMT itu. Defendan juga menyatakan bahawa perjanjian penyewaan itu tidak pernah didaftarkan seperti yang dikehendaki di bawah Kanun Tanah Negara 1965 ('KTN itu') yang bermakna bahawa untuk plaintif berjaya ia mesti termasuk dalam kekecualian di bawah KTN itu. Maka, kegagalan plaintif untuk memplid kekecualian itu seperti yang dikatakan bawah proviso s 119 KTN itu akan membiarkan persoalan mengenai penguatkuasaan perjanjian itu terbuka di bawah undang-undang. Sebaliknya, plaintif mengatakan bahawa mereka tidak bergantung di atas peruntukan KTN itu tetapi sebaliknya memohon di bawah perjanjian penyewaan itu kerana kemungkiran ke atasnya untuk ganti rugi. Defendan juga mengatakan bahawa pliding plaintif adalah melampau, remeh dan menyusahkan, atau bahawa ia mungkin memudaratkan, memalukan atau melewatkan perbicaraan yang adil ke atas tindakan itu, atau bahawa ia mungkin menjadi penyalah gunaan proses mahkamah yang beralasan di bawah A 18 k 19(b) ke (d) KMT itu.

Diputuskan, menolak permohonan itu:

(1) Mengikut A 18 k 2(1) KMT itu, defendan, jika ia ingin membela sesuatu tindakan, perlu menyampaikan pembelaannya kepada plaintif, dalam kes ini, sebelum 3 December 1994 kerana writ telah disampaikan pada 24 November 1994 melainkan kebenaran sebaliknya diberikan. Untuk mendapatkan kebenaran sebaliknya itu, alasan yang baik mesti diberikan untuk pertimbangan mahkamah. Di sini, oleh kerana tiada apa-apa alasan yang diberikan, permohonan yang kedua mesti diketepikan (lihat ms 494D–E).

(2) Ia adalah undang-undang yang jelas bahawa dalam permohonan untuk mengetepikan pliding di bawah A 18 k 19(1)(a) KMT itu, keterangan tidak akan dibenarkan, dan mahkamah mesti menimbangkan pliding untuk memutuskan sama ada pernyataan tuntutan tidak memberikan apa-apa sebab yang munasabah atau pernyataan pembelaan tidak memberikan apa-apa pembelaan. Ujian yang mesti digunakan adalah sama ada pada muka pliding itu, mahkamah bersedia untuk mengatakan bahawa kausa tindakan atau pembelaan tidak dapat dikekalkan. Maka, ia adalah tidak material sama ada pemohon dengan jelasnya memasukkan permintaan untuk bidang kuasa nyata mahkamah digunakan dalam mana-mana permohonan di bawah A 18 k 19 kerana dalam perkara A 18 k 19(a) sememangnya bidang kuasa nyata mahkamah tidak meliputi kebenaran pemberian keterangan sokongan selain daripada pliding itu sendiri (lihat ms 494I, 495A, 496G–H; *Supputetchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 tidak diikut; *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226, *A-G of the Duchy of Lancaster v London and Northwest Rlwy Co* [1892] 3 Ch 274, *Wenlock v Moloney* [1965] 2 All ER 871 dan *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 diikut).

(3) Seksyen 158 dibaca bersama dengan s 161 KTN itu, memerlukan bahawa pajakan yang mempunyai terma lebih daripada satu tahun mesti didaftarkan. Kesan tidak mendaftar ke atas pajakan ditadbir oleh proviso s 119 KTN itu yang mengatakan bahawa tidak mendaftar bukannya bermakna bahawa sesuatu tuntutan untuk ganti rugi atau perlaksanaan spesifik akan gagal. Dalam kes ini, plaintif menuntut ganti rugi untuk kemungkiran perjanjian dan salah nyata dan oleh itu tidak akan terjejas hanya kerana ianya tidak didaftarkan. Ini bermakna bahawa plaintif tidak perlu plid secara khusus kekecualian itu seperti yang disarankan oleh defendan. Maka, pernyataan tuntutan oleh plaintif itu dengan jelasnya menunjukkan kausa tindakan yang munasabah dan tiada alasan di bawah A 18 k 19(1)(a) KMT itu untuk writ dan pliding itu dibuang kerana adalah mencukupi bahawa terdapat peluang yang munasabah untuk kejayaan tindakan itu kerana tindakan itu dapat dikekalkan (lihat ms 497G–I, 498A–B; *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177 dan *Anthony Tan & Anor v Yong Foh Phin & Anor* [1960–1963] SCR 77 dibeza).

(4) Di atas keterangan yang diberikan oleh plaintif, tindakan defendant telah membangkitkan perasaan syak dalam pemikiran plaintif mengenai alasan sebenar defendan dalam memberhentikan perjanjian penyewaan itu. Maka, terdapat isu yang boleh dibicarakan dan patut dibicarakan di pembicaraan penuh untuk tindakan itu dan bukannya diselesaikan secara terus iaitu dengan membatalkan pliding plaintif itu. Ia adalah amat merbahaya untuk memutuskan sesuatu perkara di atas keterangan afidavit semata-mata dan ia adalah isu yang patut dibicarakan dengan pertimbangan yang sepatutnya iaitu dengan keterangan saksi-saksi di perbicaraan, adalah lebih baik untuk memutuskan perkara itu ditentukan di perbicaraan penuh. Tiada asas dalam defendan mengatakan bahawa pliding adalah melampau, remeh dan menyusahkan, atau bahawa ia mungkin memudaratkan, memalukan atau melewatkan perbicaraan yang adil ke atas tindakan itu, atau bahawa ia mungkin menjadi penyalah gunaan proses mahkamah (lihat ms 505C–D, G–H; *Anthony Tan & Anor v Yong Foh Phin & Anor* [1960–63] SCR 77, *Lee Ah Low v Cheong Lep Keen & Anor* [1970] 1 MLJ 7, *Lee Lam Soh v Low Ngah* [1973] 1 MLJ 97 dan *Low Kum Yoon v Teh Kim Huah* [1979] 1 MLJ 83 dibeza).]

Notes

For cases on defence, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2560–2563.

For cases on striking out writ and statement of claim, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2754–2765.

For cases on non-registration of leases, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1060–1061.

Cases referred to

A-G of the Duchy of Lancaster v London and Northwest Rlwy Co [1892] 3 Ch 274

Anthony Tan & Anor v Yong Foh Phin & Anor [1960–63] SCR 77

Lee Ah Low v Cheong Lep Keen & Anor [1970] 1 MLJ 7

Lee Lam Soh v Low Ngah [1973] 1 MLJ 97

Low Kum Yoon v Teh Kim Huah [1979] 1 MLJ 83

New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226

Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16

Supuletchimi v Palmco Bino Sdn Bhd [1994] 2 MLJ 368

UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors [1989] 3 MLJ 177

Wenlock v Moloney [1965] 2 All ER 871

Legislation referred to

National Land Code 1965 ss 119, 158, 161

Rules of the High Court 1980 O 18 rr 2(1), 19

Rules of the Supreme Court 1965 O 18 r 19 [Eng]

YY Sim (Chew, Jugah, Wan Ullok & Co) for the plaintiffs. A
Albert Tang (Tang & Partners) for the defendant.

Cur Adv Vult

Abdul Kadir Sulaiman J: This is an application by the defendant under O 18 r 19(1)(a)–(d) of the Rules of the High Court 1980 ('the RHC') for B the striking out of the writ and the statement of claim of the plaintiffs. The application also includes a prayer for an order that the filing of the defence be deferred to 14 days after the disposal of this application. By this last prayer, I take it to mean that in the event that this application for striking out is unsuccessful, the defendant requests for 14 days' extension to file the C defence.

As regards this second prayer of the defendant concerning the deferment of the statement of defence, no ground is given and nothing at all was mentioned in the affidavit in support and no submissions made by learned counsel on the matter. I believe the defendant assumes that as a matter of course when unsuccessful in the first prayer, an order on the D second prayer would be made giving it time to file the necessary defence. But under the RHC, the filing of the defence outside the time allowed, unless agreed upon, requires the leave of the court with good reason given. In this case, in the absence of any reason given, this second prayer must be dismissed. The defendant to date has not filed its defence. A memorandum E of appearance was filed on 7 December 1994 and this present application was filed on 19 December 1994 seeking the two orders mentioned earlier. By O 18 r 2(1) of the RHC, the defendant, if it intends to defend the action, is required to serve the defence on the plaintiffs, in this case, by 3 December 1994 as the writ was served on 24 November 1994 unless leave to the contrary is given. For such leave to be given, a good reason must be F provided for the consideration of the court.

I will next consider the merits of the first prayer for the striking out of the writ and the statement of claim of the plaintiffs. The application is on all the four grounds provided by O 18 r 19(1) which includes ground (a) that the said writ and statement of claim of the plaintiffs disclose no G reasonable cause of action. For this ground, the law is settled that no evidence shall be admissible. Apart from the authorities, it is expressly stated in O 18 r 19(2) itself. However, learned counsel for the defendant in his submission tried very hard to convince me that on the basis of the court's inherent jurisdiction, evidence is allowable to establish that the pleadings of the plaintiffs disclose no reasonable cause of action H notwithstanding sub-r (2). In support of his contention, he cited the case of *Supputetchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 where it was held that under its inherent jurisdiction, the court is entitled to look at and decide upon the contents of the affidavits. With all respect due to my learned brother who decided the matter, I beg to differ in the light of the I settled authorities and the law on the matter. As stated in the Federal Court case of *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 at p 227 by Mohamed Azmi FJ delivering the judgment of the court, referring to the case of *A-G of the Duchy of Lancaster v London and Northwest Rlwy Co* [1892] 3 Ch 274, it is

clear law that in an application to strike out pleadings under O 18 r 19(1)(a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied (for purpose of O 18 r 19(1)(a)) is whether on the face of the pleadings, the court is prepared to say that the cause of action or the defence is obviously unsustainable. It makes no difference even if the court is acting in pursuance of its inherent jurisdiction. This is clearly borne out in the case of *Wenlock v Moloney* [1965] 2 All ER 871, which was an application by the defendant pursuant to the equivalent Rules of the Supreme Court 1965 O 18 r 19 and alternatively under the inherent jurisdiction of the court to strike out the pleadings and dismiss the action on the grounds that the pleadings disclosed no reasonable cause of action, were frivolous, vexatious and an abuse of the process of the court. Mohamed Azmi FJ delivering the judgment of the Federal Court in the *New Straits Times*' case, referring to *Wenlock v Moloney*, had this to say at p 227:

> Ten affidavits were filed, five by the defendants in support of the application and five by the plaintiffs in opposition thereto. The Master read the affidavits, the documents exhibited thereto and considered the issues of fact raised by the affidavits. There was no cross-examination on the affidavits or oral evidence. The Master held that the plaintiffs' action was most unlikely to succeed and he accordingly struck out the pleadings and the action. On appeal to the Court of Appeal, it was held that the trial of issues of fact on affidavits to ascertain whether the plaintiff had a case was an usurpation of the functions of the trial judge and was a wholly improper procedure; and that since the pleadings on their face disclosed a reasonable cause of action and raised issues of fact which required to be determined on oral evidence, the action would not be struck out but would proceed to trial.

Apart from the cases cited earlier, there is also the Supreme Court case of *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 which prohibits the use of evidence for the purpose of O 18 r 19(1)(a) of the RHC. It was held that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O 18 r 19 of the RHC unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be. By that it means that for determining whether the pleadings disclosed a reasonable cause of action or defence, no evidence is admissible. The answer is to be found from the four corners of the pleadings only. It is immaterial whether the applicant expressly includes a prayer for the court's exercise of its inherent jurisdiction in any application under O 18 r 19 for it is implicit in every such application for the court to exercise such of its jurisdiction but in dealing with ground (a) of O 18 r 19(1) the inherent jurisdiction of the court does not extend to admitting evidence in support apart from the pleadings itself. Therefore, guided by the authorities, for the purpose of dealing with ground (a) of O 18 r 19(1) of this application of the defendant, I will confine myself to the pleadings of the plaintiffs as contained in their statement of claim to determine whether the pleadings discloses any reasonable cause of action against the defendant.

The claim of the plaintiffs as contained in the statement of claim is for damages arising out of the alleged breach of tenancy agreement and, in the alternative, damages for misrepresentation by the defendant in connection with a lease of the defendant's premises by the plaintiffs contained in a tenancy agreement dated 11 February 1988 entered into between the parties, for interest on the judgment sum, and costs. As pleaded in the statement of claim, the demised premises is identified. The term of the tenancy is for five years commencing from 30 March 1988 and expiring on 31 March 1993 at a monthly rental of RM3,500 per month with an option clause for the plaintiffs to renew the tenancy for a further term of five years thereafter at a rental to be agreed between them and if no such agreement upon the rental is reached within one month prior to the expiration of the current five year term, an independent valuer shall be appointed to decide on the new rental to be paid in respect of the new tenancy for a further term of five years. By a letter dated 28 October 1992, the plaintiffs exercised the option provided in the agreement for the renewal of the tenancy for a further term of five years after 31 March 1993 at a proposed rental of RM3,500 per month and the defendant was given 14 days to respond to the proposed rental. The defendant by a letter in reply dated 12 December 1992 informed the plaintiffs of its intention not to renew the tenancy and made no mention at all in regard to the rental of RM3,500 proposed by the plaintiffs. The plaintiffs then by a letter dated 21 December 1992 suggested to the defendant the appointment of a named valuer to determine the rental as provided in the tenancy agreement. On 2 January 1993, the defendant wrote to the plaintiffs informing that it required the demised premises for its own use. However, subsequently the plaintiffs discovered that, on or around 1 August 1993, the defendant granted a sublease to Golden Arches Restaurant Sdn Bhd ('the Restaurant'), for a term of 18 years at a rental ranging from RM7,000 to RM9,834 per month which is more than the rental proposed by the plaintiffs. The plaintiffs aver that the defendant by telling that it needed the demised premises for its own use, knew that the representation was false and untrue. Relying on the said representation believing the same to be true, the plaintiffs vacated the demised premises on or around 12 April 1993. In the circumstances, the plaintiffs aver that the defendant was in breach of the term of the tenancy agreement in depriving the plaintiffs of their option to renew the tenancy for a further period of five years and for that the plaintiffs suffered loss and damage. In the alternative, the plaintiffs aver that they had suffered loss and damage on account of the representation by the defendant. The particulars of loss and damage listed are for:

(i)	Loss from sale of furniture, fitting and fixture	RM50,000.00
(ii)	Loss from sale of kitchen utensils	RM15,000.00
(iii)	Loss of renovation costs	RM16,968.20
(iv)	Loss of business profits for five years.	

As stated earlier, the defendant had not filed its defence to date to counter the claim of the plaintiffs. In the absence of the defence, the pleadings of the plaintiffs must be assumed to be true. If it were true, on the pleadings of the plaintiffs, it would disclose a reasonable cause of action against the defendant.

But learned counsel for the defendant in his submission submits that the plaintiffs plead the existence of a tenancy agreement affecting a landed property but did not plead whether it was registered with the Land Office as required by the National Land Code 1965 ('the NLC'). In support, he cited a passage from *Odger's Principles of Pleading and Practice* (21st Ed, 1975 Reissue) at pp 93–94. I think this issue was brought out because to the knowledge of the defendant, this tenancy agreement for a period of five years was never registered as required by the NLC. But that is a matter for the evidence and for the defendant to raise in its pleadings which under ground (a) of O 18 r 19(1) no evidence is admissible. What is to be considered is merely the pleadings itself. It was pointed out by learned counsel that if the plaintiffs were to succeed it must be within the exception provided by the NLC as the agreement was not so registered. Hence, this failure by the plaintiffs to plead the exception would leave open the question of enforceability of the agreement under the law. Such being the case, learned counsel submits that the statement of claim discloses no reasonable cause of action. In further support of his argument, counsel also cited the following cases: *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177, and *Anthony Tan & Anor v Yong Foh Phin & Anor* [1960–63] SCR 77 (CA). In reply, learned counsel for the plaintiffs submits that they are not relying on the provisions of the NLC but instead are claiming under the tenancy agreement for breach thereof, to which submission I agree, as s 119 of the NLC allows it by way of an exception.

It is not in dispute that the said tenancy agreement was never registered. What then is the effect of such non-registration on the claim of the plaintiffs as disclosed in the statement of claim for damages for breach of the agreement and for misrepresentation? To get the answer to this pertinent question, resort had to be had to the relevant provisions in the NLC. First, is s 158 read with s 161 which requires that any sublease for any term exceeding one year must be registered. The effect of the non-registration of such a sublease is governed by the proviso to s 119 of the NLC which expressly states that the non-registration shall not operate to defeat a claim for damages or for specific performance founded upon, or arising from, such an instrument. The unregistered agreement will be ineffectual only if it is for the object of passing any land or any interest therein, or render any land liable as security for the payment of money, until it has been registered. In this case, from the pleadings, the plaintiffs are not applying for the object for which it is prohibited by s 119 until the said tenancy agreement is registered. The plaintiffs are by the pleadings claiming for damages for breach of the agreement and for misrepresentation and therefore are not affected whatsoever on account of the tenancy agreement being unregistered. Such being the position, it is not necessary, therefore, for the plaintiffs to expressly plead the exception as suggested by learned counsel for the defendant. As to the two cases cited, they are of no relevance to the issue before the court because the case of *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177 concerns an assignment of a debt which without specific averment in the pleadings would not bring the matter within the statute which created the right, and the case of *Anthony Tan & Anor v Yong Foh Phin & Anor* [1960–63] SCR

77 (CA) concerns a claim for possession of the demised premises which is caught by s 119 of the NLC for non-registration. Whereas, in this present case, the plaintiffs are not claiming a matter within a statute creating the right or for possession of the demised premises the subject matter of the tenancy agreement. As stated earlier, the claim of the plaintiffs is founded upon the tenancy agreement for damages. On this basis, the statement of claim of the plaintiffs clearly discloses a reasonable cause of action. Therefore, there is no basis under O 18 r 19(1)(a) of the RHC for the writ and the pleadings to be struck off as prayed for by the defendant. At this stage, the plaintiffs need not satisfy the court that on the pleadings they are certain of being successful in the action against the defendant. It suffices if there is a reasonable chance of success in the sense that the action is not unsustainable.

Next, I move to consider the application of the defendant on the other three grounds spelt out under O 18 r 19(1)(b)–(d) of the RHC. Under these grounds, evidence is receivable. The application of the defendant based on these grounds is supported by an affidavit affirmed by Teo Thuan Kong, the secretary of the defendant company. The plaintiffs oppose this application by the filing of an affidavit by the first plaintiff and another by Lily Lau Ung Chai, his sister and the assistant manageress of the business carried out by the plaintiffs at the demised premises. The relevant tenancy agreement is exhibited as exh T1 to the affidavit of the defendant. The agreement is for the initial period of five years, the occupation date shall not be later than 30 March 1988; according to the statement of claim, it commenced on 30 March 1988 and would expire on 31 March 1993. Though the period exceeds a term of one year, the said agreement was never registered. This is not due to ignorance or an oversight for by exh T8 to the affidavit of the defendant, both parties by a letter dated 25 February 1988 addressed to KC Wong & Associates informed that they did not wish to have the said agreement registered or stamped. According to the affidavit in support of Teo Thuan Kong for the defendant, by exh T2 dated 16 October 1992, the defendant informed the plaintiffs that it was not desirous of renewing the said tenancy upon its expiration. It is to be noted that exh T2 does not provide any reason for the defendant not renewing the tenancy but it merely asked the plaintiffs to look for other premises to rent when the tenancy expired. This initiative was taken by the defendant even before the plaintiffs exercised their option to renew the said tenancy as provided for in the agreement. The existing term was to expire on 31 March 1993 but the notice by the defendant was about five months ahead of time. Be that as it may, it is clear from exh T2 that the defendant would not renew the tenancy after expiration of its existing period. There is no mention that at the end of the five-year period the defendant was no longer desirous of granting any tenancy of the demised premises.

About two weeks after the receipt of exh T2 from the defendant, the plaintiffs by a letter dated 28 October 1992, exh T3 to the affidavit of the defendant, gave a notice to the defendant of the exercise of their option to renew the tenancy for a further term of five years acting in pursuance of cl III(3) of the tenancy agreement. This is done well within time as

provided for in the said clause. In the said notice, the plaintiffs offered to pay the same rate of rental of RM3,500 per month. However, in the said option letter, the plaintiffs also informed the defendant that should the rate be disagreeable to the defendant, the latter was to let the plaintiffs know within 14 days from the date of receipt of the letter of the new rate for their consideration. Understandably, in the light of exh T2, the defendant by another letter dated 12 December 1992 ('exh T4'), reiterated its stand of not renewing the tenancy. Again, in this letter, no reason was provided. Not being satisfied with that, the defendant by a letter dated 2 January 1993 ('exh T5'), informed the plaintiffs again that it will not renew the tenancy with reason provided that it required the demised premises for its own use. Left with no choice having had the reason provided by the defendant for not renewing the tenancy, the plaintiffs vacated the demised premises on or about 12 April 1993, which was about two weeks after the expiration of the period for the existing tenancy. The defendant upon entering into occupation of the premises, put up its own signboard at the said premises. It would have been a happy ending for the parties if things were left at that for the plaintiffs could not enforce the right to renew the tenancy if the defendant was no longer desirous of granting any tenancy of the demised premises. The reason given by the defendant for not wanting to renew the tenancy to the plaintiffs as it wanted the premises for its own use would have left the plaintiffs with no grouse against the defendant.

But some four months later, on 1 August 1993, the plaintiffs began to suspect that the intention of the defendant in not renewing the tenancy was not because of the reason provided, but was due to an intention to sublease the demised premises to the Restaurant. The putting up of the defendant's own signboard at the demised premises was merely a temporary cover. As it turned out, the sublease to the Restaurant was for an 18-year period with rental of RM7,000 per month from 1 August 1993 to 31 July 1996, then at RM7,840 per month from 1 August 1996 to 31 July 1999, then at RM8,780 per month from 1 August 1999 to 31 July 2002, then at RM9,834 per month from 1 August 2002 to 31 July 2005, then at RM11,014 per month from 1 August 2005 to 31 July 2008, and then at RM12,336 per month from 1 August 2008 to 31 July 2011. This is reflected in exh T7 which is a memorandum of sublease entered into between the defendant and the Restaurant. Hence, the action for damages against the defendant for breach of the term of the agreement and alternatively for misrepresentation.

The deponent in his affidavit in support of this application by the defendant contends that the tenancy agreement (exh T1) is unenforceable at law and has no legal effect on account of its non-registration under the NLC.

The affidavit in opposition of Paul Law Ung Hua for the plaintiffs, discloses that it was the intention of the defendant at all material times to grant a tenancy to the operator of the Restaurant, for as far back as July 1992 he was approached by one Yeo Hock Hoh who represented to him as the agent for the Restaurant from Kuala Lumpur that he (Yeo) was making enquiry on behalf of the principal whether he was agreeable to have the existing tenancy terminated prematurely to allow the Restaurant

to come in and that he would be appropriately compensated for doing so. Yeo offered RM300,000 as compensation but since then nothing more was heard from him. A

Towards the end of 1992, again before the expiry of the existing term, a representative of the defendant with a few others went to the demised premises for an inspection and survey of the premises. The deponent of the other affidavit for the plaintiffs, Lily Lau Ung Chai, confirmed that she took them round the demise premises. One of the persons who came with the representative of the defendant was the owner and the landlord of the adjoining shoplot which together with the demised premises was subsequently subleased to the Restaurant. On numerous other occasions prior to the expiry of the existing tenancy, this representative of the defendant indicated to him that the Restaurant was interested to take up the demised premises at a monthly rental of RM7,000 and he was asked whether he was prepared to continue with the tenancy of the demised premises at the rate so offered by the Restaurant. When he asked for a possibility of a reduction he was refused outright considering the offer made by the Restaurant. Being aware of the provisions in the agreement concerning the option for renewal and the determination of the new rental rate he, on or around 6 October 1992, instructed a licensed valuer to determine the rental value of the demised premises and the valuation given was RM4,700 per month. He exhibited a copy of the said valuation report as PLAH1. He then received exh T2 mentioned earlier from the defendant informing him that the defendant did not wish to renew the tenancy upon its expiration. It is to be noted at this juncture again that the letter in exh T2 merely states that the defendant did not wish to renew the tenancy but no mention was made pursuant to cl III(3) that the defendant is not desirous of granting any tenancy of the demised premises. This is significant because the renewal of the existing tenancy is distinct from not granting a tenancy at all for the demised premises suggestive of the intention of the defendant to use the demised premises for its own occupation. Following the advice of his legal advisor, he wrote exh T3 exercising the option to renew for another five years. Hence, the other correspondence between the parties as mentioned earlier. Following that, the plaintiffs wrote another letter to the defendant and exhibited as PLAH2 referring to the defendant's letter in exh T4 informing the defendant of the plaintiffs' right to the first option to renew and the reference to an independent valuer for the new rate of rental. Again it is significant to note from the content of exh T4 from the defendant which merely emphasized the fact that it would not renew the tenancy with the plaintiffs but nothing was mentioned of the fact that it did not intend to grant a lease of the premises altogether after the expiration of the current tenancy of the plaintiffs. The defendant did not respond to the proposal for the appointment of an independent valuer but instead sent exh T5 saying that the defendant would not renew the tenancy with the plaintiffs as it required the demise premises for its own use. Though this letter again speaks of not renewing the tenancy but for the reason given it can be taken that the defendant was no longer desirous of granting a tenancy over the demised premises after the tenancy agreement with the plaintiffs expired. On the strength of this exh T5 from the defendant, the plaintiffs vacated the demised premises on 12 April 1993. B C D E F G H I

A The deponent conceded that after they vacated the premises, the defendant put up its signboard but according to the deponent, it was a mere eyewash because on his numerous visits to the premises between the months of April 1993 to August 1993 there was no business activity being carried out in the premises by the defendant until taken over by the Restaurant in August 1993.

B

The affidavit of Lily Lau Ung Chai, the sister of the first plaintiff, reveals that she was employed as an assistant manageress by the plaintiffs to work in the demised premises at all material times. She deposes that one day towards the end of 1992 while she was on duty at the demised premises, the group mentioned in the affidavit of the first plaintiff C enumerated earlier, came and asked for her permission to inspect and survey the premises. One of the men was wearing a black and white stripped shirt bearing the logo of the Restaurant. She consented and took them and showed them around the premises. To all these allegations by the first plaintiff and his sister in the two affidavits, the defendant did not D file any affidavit in reply.

For the purpose of O 18 r 19(1)(a) of the RHC, I have found on the pleadings of the plaintiffs that they have a reasonable cause of action against the defendant. But on the evidence by way of the various affidavits filed by the parties, I must satisfy myself on the contention of the defendant by this application that the pleadings is either scandalous, frivolous or E vexatious, or that it may prejudice, embarrass or delay the fair trial of the action, or that it is otherwise an abuse of the process of the court grounded under O 18 r 19(1)(b) to (d) of the RHC and under the inherent jurisdiction of the court. The answer to all these centres around the meaning to be given to the provisions as contained in the agreement between the parties F (exh T1) which of particular importance is cl III thereof.

Clauses III(2) to (4) thereof states as follows:

III Provided always and it is hereby mutually agrees as follows:

(2) That if the tenant shall be desirous of determining this tenancy before the expiration of the term hereby granted and of such his desire shall G give to the landlord at least three months' previous notice in writing and shall up to the time of such determination pay the rent and reasonably perform and observe all the covenants on his part herein contained then immediately on the expiration of the three months' notice the term hereby granted shall thereupon cease and the deposit RM21,000 shall be forfeited by the landlords but without prejudice to H the claim of the landlords in respect of any antecedent breach of the tenant's covenants herein contained.

(3) That if the tenant shall be desirous of taking a new tenancy of the demised premises after the expiration of the term hereby granted and of such his desire shall give to the landlords notice in expiration of the said term and if the landlords shall then be desirous of granting a new I tenancy the landlords shall grant the first option to the tenant and shall at or before the expiration of the term hereby created grant to the tenant a new tenancy of the demised premises for a further term of five years commencing from and after the expiration of the term hereby granted on the same term and conditions appears herein at a rental as may be agreed between the landlords and the tenant.

(4) The tenant and landlords hereby mutually agree that in the event the parties cannot within one month prior to the expiration of the term hereby granted agree as to the rental for the demised premises for the further term of five years, the parties shall mutually appoint an independent valuer who shall determine the appropriate rental for the demised premises for the said further term of five years based on the prevailing market condition and the decision of such independent valuer shall be final and binding.

And sub-cl (10) thereof states that any notice, request or demand required to be served by either party hereto to the other parties/party under the provisions of this agreement shall be in writing and shall be deemed to be sufficiently served if it is given by the party or his/her solicitors by AR Registered post/letter addressed to the parties to be served at his/her address hereinbefore mentioned and in such a case it shall be deemed (whether it is actually delivered or not) to have been received at the time when such a registered letter would in the ordinary cause be delivered, or if it is given by the party or his/her solicitors despatched by hand to the party to be served or his/her solicitor.

Perusing the tenancy agreement, I cannot find a clause similar to cl III(2) in the case where the landlord is desirous of determining the tenancy before the expiration of the five years granted to the tenant by this agreement. It is fair to assume that for so long as the tenant keeps to his agreement within the five-year period covered by the agreement, the landlord would not determine the tenancy prematurely. Clause III(1) thereof is the usual clause which would cover a situation where the tenant is in breach during the period of the tenancy.

In the event that happened before the expiry of the five-year term covered by the agreement, the defendant by exh T2 as early as 16 October 1992 forewarned the plaintiffs that it will not renew the said tenancy upon its expiration on 31 March 1993. No reason was provided by the defendant in that letter for not wanting to renew the tenancy. As at that date there was no evidence that the plaintiffs were in breach of the terms of the agreement. On the interpretation of cl III(3), the defendant would have a qualified right to do so. I say qualified right because according to my understanding of the wordings of that provisions, the initiative must first come from the plaintiffs and not the defendant owing to the absence of any specific provisions allowing the defendant to determine the tenancy during the currency of the tenancy term and in the absence of evidence of any breach committed by the plaintiffs. It operates only if the tenant before the expiration of the existing five-year term is desirous of 'taking a new tenancy' after the expiration of the existing term. In such an event, it is for the tenant to give a prior notice to the landlord of his intention to do so. Such an intention on the part of the plaintiffs is to be found in exh T3. This the plaintiffs so indicated well before the expiration of the existing five-year term though after the receipt of exh T2 from the defendant of its desire not to renew the term. According to the said cl III(3), upon the receipt of such a notice by the plaintiffs, 'if the landlords shall then be desirous of granting a new tenancy the landlords shall grant the first option to the tenant'. It goes without saying that in the circumstances that the

defendant is no longer desirous of granting a tenancy of the demised premises after the expiry of the current term, the plaintiffs cannot insist on the defendant to renew the tenancy for a further term. This intention of the defendant not to grant a new tenancy of the demised premises to anyone including the plaintiffs can safely be said to be contained in its letter to the plaintiffs dated 2 January 1993 as evidenced by exh T5. If the matter stops there, there is nothing that the plaintiffs can quarrel about for it is within the provisions of the said cl III(3) of the agreement. The plaintiffs have no cause to exert their rights of the first option. The plaintiffs even conceded that after they vacated the premises on 12 April 1993, the defendant did put up its own signboard which was indicative of the fact that the defendant was no longer desirous of leasing or renting out the demised premises after the expiration of the existing five year term with the plaintiffs. But on the affidavit evidence of the plaintiffs, it does not appear to happen that way. As far back as July 1992, about three months before the first letter of the defendant in exh T2, a representative from the would be tenant, the Restaurant, was making an offer to the plaintiffs with compensation for the plaintiffs to terminate the tenancy with the defendant prematurely. This was never followed up by the Restaurant presumably because of the high demand for compensation put up by the plaintiffs for them to do that. Then towards the end of 1992, while still within the period of the tenancy with the plaintiffs, a group of persons including that of the defendant and the Restaurant came to the demised premises for an inspection and survey of the premises. Again, on numerous other occasions prior to the expiry of the tenancy with the plaintiffs, a representative of the defendant indicated that the Restaurant was interested to take up the premises at a monthly rental of twice the rate paid by the plaintiffs and enquired from the plaintiffs whether they could continue with the tenancy at the same new rate. Upon being asked for a possibility of a reduction, the plaintiffs were told that they either agree with the new rate offered or provide a higher rate than that. This crucial piece of evidence by the plaintiffs is not at all challenged by the defendant.

Learned counsel for the defendant in his submission in support of these grounds again cited the case of *Anthony Tan & Anor v Yong Foh Phin & Anor* [1960–63] SCR 77 (CA) mentioned earlier. He submits that the plaintiffs by their statement of claim alleged that the defendant had been in breach of the term of the tenancy agreement in depriving the plaintiffs of their option to renew the tenancy for a further term of five years causing the plaintiffs to suffer loss and damage and alternatively, the plaintiffs claimed that they suffered loss and damage by reason of misrepresentation on the part of the defendant. He contends that the plaintiffs are enforcing their interests related to land matter and is therefore caught by s 119 of the NLC. At the risk of repetition, I say that the said provision does not apply in this case because, distinguishing it with the case cited, the plaintiffs in this case is not claiming for possession of the demised premises by relying on the unregistered tenancy agreement. The plaintiffs' action is for damages for breach of contract or alternatively for misrepresentation. Ainsley CJ in the case cited has this to say at p 81:

> In my opinion, the agreement for a five-year lease was, because of lack of registration, valueless as a defence to the claim for possession. From that agreement, the respondents got precisely nothing, save the opportunity of claiming specific performance, or damages, of which opportunity they did not avail themselves.

The next case *Lee Ah Low v Cheong Lep Keen & Anor* [1970] 1 MLJ 7 cited by learned counsel again concerns a claim for vacant possession of the demised premises based on a void 80-year lease by the respondent landlord against the appellant tenant by giving a month's notice terminating the tenancy upon the belief that it was a monthly tenancy. Upon the true construction of the lease agreement, the Federal Court held that it was a yearly tenancy and consequently the notice given by the landlord was not effective to give him possession of the demised premises. Thus, this case before me now is again distinguishable from the case cited as the claim by the plaintiffs is allowed by s 119 of the NLC not being a claim for land or any interest therein, or to render the land liable as security for the payment of money, notwithstanding that the tenancy agreement was not registered.

Learned counsel next cited the case of *Lee Lam Soh v Low Ngah* [1973] 1 MLJ 97 in urging the court to strike out the pleadings of the plaintiffs on the ground that the tenancy agreement is void under s 119 of the NLC for non-registration. This case cited is again on the issue of claim for possession which has no relevance to the present application before me which relates to the claim for damages for breach and misrepresentation which is expressly allowed by the proviso to s 119 of the NLC notwithstanding that the agreement was not registered.

Learned counsel for the defendant also argues that as the tenancy agreement was not registered, the tenancy became a monthly tenancy and was terminated by affluxion of time when the term expired on 31 March 1993. Hence, the issue of option for the renewal would not arise. He cited the case of *Low Kum Yoon v Teh Kim Huah* [1979] 1 MLJ 83. Again, in my respectful view, the case cited is not to be taken as an authority to support the defendant in its application now. The case cited again concerns the dispute as to the possession of the demised premises. However, in the present case, the plaintiffs' claim is for damages and not possession of the premises as the plaintiffs had given up possession of it on 12 April 1993.

It was next argued that cl III(3) of the tenancy agreement expressly stipulates that the option to renew is exercisable subject to the condition that the plaintiffs as tenant have given notice of his desire to take a new tenancy and the defendant as the landlord is also desirous of granting a new tenancy. Since the defendant by the various correspondence did not wish to grant a new tenancy, and had duly notified the plaintiffs of its intention, there was no question of the tenancy being renewed at all and hence no question of the defendant being in breach of the agreement. But with all respect, by the operation of cl III(3) the defendant can avoid giving renewal to the plaintiffs only if there is no prior option exercised by the plaintiffs or the defendant is no longer desirous of granting a tenancy at all over the demised premises after the expiration of the period of the existing

A tenancy either to a new tenant or to the plaintiffs by way of renewal of the existing tenancy. The various letters from the defendant to the plaintiffs and also the fact of its display of its own signboard after the delivery of the possession by the plaintiffs may well be the expression of its intention not to do so. But for the unrebutted evidence of the plaintiffs concerning the negotiations had between the defendant and the Restaurant during the currency of the tenancy with the plaintiffs, the plaintiffs would have very little chance of success owing to the fact of the defendant's intended occupation of the premises for itself. By doing so in good faith in April 1993, the defendant cannot forever be precluded from renting out the premises to a third party other than the plaintiffs at some other future date. However, on the evidence tendered by the plaintiffs, the act of the defendant albeit a few months later in August 1993 had caused much suspicion in the mind of the plaintiffs as to the true intention expressed in the various letters of the defendant. This is a triable issue fit to be disposed of at the full trial of the action and not by summary procedure of striking out the pleadings of the plaintiffs. Only in a plain and obvious case will the court grant such an application as sought by the defendant here. It is extremely dangerous to decide the matter on pure affidavit evidence and it being a triable issue which requires proper consideration of evidence of witnesses given in a trial, it is best left for the decision of the judge at the full trial of the action.

The next ground of attack over the pleadings of the plaintiffs is that it lacks particulars in relation to the alternative claim based on misrepresentation. Learned counsel cited *Bullen & Leake & Jacob's Precedents of Pleadings* (12th Ed) in support. However, in the light of the pleadings of the plaintiffs, I see no merit in the argument put forward by learned counsel. Paragraphs 3 to 9 of the said pleadings clearly provide sufficiently the necessary particulars to found an action against the defendant on misrepresentation.

Thus, in the light of what has been said above, I cannot safely say that it is a plain and obvious case for a striking out of the writ and the statement of claim of the plaintiffs under O 18 r 19(1)(a) to (d) of the RHC and even under the inherent jurisdiction of the court. The matter ought to be properly resolved at the full trial of the action and there is no basis at all for saying that the action of the plaintiffs is either scandalous, frivolous or vexatious, or that it may prejudice, embarrass or delay the fair trial of the action, or that it is otherwise an abuse of the process of the court. Hence, the application of the defendant is dismissed with costs to the plaintiffs to be taxed unless agreed. The second prayer of the defendant for extension of time to file the defence is also dismissed for the reason stated earlier.

Application dismissed.

Reported by Ng Kian Pin